IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0603

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM A. PARRISH,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Sixteenth Judicial District Court,
Rosebud County, The Honorable Joe L. Hegel, Presiding

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Appellant William Parrish respectfully submits this reply to Appellee's brief.

I. THE STATE'S VIOLATION OF *BRADY* WARRANTS A NEW TRIAL OR DISMISSAL.

All four elements necessary to establish a *Brady* violation are present. The violation of *Brady* impeded Parrish's ability to present a full and complete defense, thus violating his right to due process. The State argues that a violation of due process exists only when evidence is material to either guilt or punishment. However, the question of a due process violation flowing from a Brady omission does not depend upon the weight of the undisclosed evidence but upon its "favorable tendency." *Kyles v. Whitley*, 51 U.S. 419, 451 (1995). The favorable tendency of the releases signed by B.H. is clear and was noted by the district court ("releases would have cast more doubt on Grant Larson's testimony . . . thereby buttressing Defendant's argument."). (D.C. Doc. 147.)

The State attempts to draw similarities between this matter and *State v. Jackson*, 2009 MT 427, 354 Mont. 63, 221 P.3d 1213, in support of its argument that no *Brady* violation occurred. This case is distinguishable from *Jackson*. In *Jackson*, the defendant sought a new trial on the basis that the State withheld statements made by a law enforcement witness to his counselor that were potentially exculpatory. The district court determined, and this Court agreed, that the State was unaware of the substance of communications between the witness

and his counselor, the defendant failed to prove a nexus between the statements and the criminal investigation and that the statements would not have been helpful to the defendant. Additionally, in *Jackson*, the defendant had been put on notice six months prior to trial that the witness had spoken with his counselor regarding the shooting. *Jackson*, ¶ 54.

Here, the releases were exculpatory in that they went to Parrish's mental state, a necessary element the State was required to prove. Moreover, the district court acknowledged that the release could have been beneficial to Parrish's defense. Finally, Parrish requested information regarding the previous involvement with DPHHS seven months prior to the trial. The documents were not produced until six days prior to the commencement of the trial, and even then, the releases were not included. It cannot be said that Parrish had sufficient notice. The present case is distinguishable from *Jackson*. The evidence surely would tend to cause the jury to believe Parrish's defense and testimony, and the testimony of B.H. regarding their ongoing fear of DPHHS involvement. The appropriate remedy for such a violation is a new trial or dismissal.

II. THE FAILURE TO INCLUDE AN INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF NEGLIGENT ENDANGERMENT SHOULD BE REVIEWED UNDER THE PLAIN ERROR DOCTRINE, OR AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Plain error review is invoked sparingly, and only in instances where failure to review the alleged error may result in a manifest miscarriage of justice or may compromise the integrity of the judicial process. *State v. Adgerson*, 2003 MT 284, ¶ 13, 318 Mont. 22, 78 P.3d 850. Such a circumstance exists here.

In *State v. Castle*, 285 Mont. 363, 366, 948 P.2d 688, 690 (1997), this Court held:

> A defendant may be convicted only of the "greatest included offense about which there is no reasonable doubt." Section 46-16-606, MCA. A defendant is therefore entitled to an instruction on a lesser included offense if any evidence exists in the record from which the jury could rationally find him guilty of the lesser offense and acquit of the greater. Section 46-16-607(2), MCA; *State v. Fisch* (1994), 266 Mont. 520, 522, 881 P.2d 626, 628. The purpose of this rule is to ensure reliability in the fact-finding process.

The judicial system relies heavily upon the jury as the fact-finder in a criminal trial. The jury is vested with determining the facts, credibility of witnesses and ultimately determining guilt. It is imperative to the integrity of the judicial process that juries have all the necessary information in order to adequately perform as fact finders. As indicated in *Castle*, including a lesser-included offense instruction ensures the reliability of the fact-finding process, which then preserves the fundamental fairness and integrity of the judicial process. For this reason, it would

be appropriate to apply plain error review to the issue of the failure to include an instruction on the lesser-included offense of negligent endangerment.

Alternatively, this Court should consider that Parrish's trial counsel was ineffective for failing to propose an instruction for negligent endangerment. If any evidence exists in the record from which the jury could rationally find him guilty of the lesser offense and acquit of the greater, a defendant is **entitled** to that instruction. *See Castle* (emphasis added). There was sufficient evidence in the record that the jury could rely upon in determining if negligent endangerment was more appropriate. Moreover, there is nothing in the record to suggest that Parrish was looking for an all or nothing outcome. It was undisputed that Parrish delayed in telling B.H. about the fall and seeking medical care.

Parrish would urge this Court to adopt the reasoning set forth in the dissent in *State v. Sellner*, 286 Mont. 397, 951 P.2d 996 (1997). As in *Sellner*, the record does not reflect that Parrish was looking for an all or nothing outcome; the possible sentence for negligent endangerment was one year, as opposed to ten for criminal endangerment; and Parrish acknowledged his role in the injuries. This Court should find that Parrish's trial counsel was not performing within the range of competence demanded of attorneys under similar circumstances and that, by reason of this inadequate performance, Parrish suffered prejudice.

Respectfully submitted this ____ day of July, 2010.

By: _____
ELIZABETH THOMAS
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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